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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

NILDA S. PALACIOS,

Defendant and Appellant.

B213404

(Los Angeles County
Super. Ct. No. BA221198)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Kathleen Kennedy-Powell, Judge. Affirmed.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee, and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Nilda S. Palacios appeals from the judgment entered after a jury convicted her of second degree murder. She contends she received ineffective assistance of counsel because her lawyer failed to request instructions on the effects of her intoxication and mental disorder on her ability to form the intent to aid and abet the murder. Because those issues were covered by other instructions, we affirm.

FACTS AND PROCEDURAL HISTORY

On the morning of July 29, 2001, Agapito Noe's body was found inside a sleeping bag at the parking lot of an industrial business. According to a Los Angeles police officer who was called to the scene, Noe's body appeared to have been stuffed head-first inside the sleeping bag. A shirt was twisted tight around Noe's neck. An autopsy showed Noe was strangled to death, and had also received three potentially fatal blows to the head. Noe had a spinal disorder that left him with small, thin legs, and he needed crutches to walk. Noe's friend, Maynorsuchite Barrientos, reported Noe missing a few days earlier when he could not find Noe at home.

Noe lived in a motor home parked on a residential lot. Nilda S. Palacios and her boyfriend, Manolo Morataya, lived in a house on the same lot.¹ After Noe's body was found, his motor home was searched. Blood stains were seen throughout the motor home. Blood stains were also found throughout the house where Palacios and Morataya lived. In September 2001, Palacios was interviewed by Ervin Youngblood, a police interview specialist. Palacios first said Morataya killed Noe because they had had several recent disputes. Palacios said she handed Morataya the shirt used to strangle Noe, but did not physically take part in the killing. However, she helped Morataya clean up Noe's trailer and dispose of Noe's body.

Youngblood said he did not believe Palacios, and falsely told her Morataya had told him what really happened. Palacios then gave a more incriminating version of the

¹ Morataya's name is spelled "Moratalla" in the record on this appeal. We use the spelling "Morataya" consistent with the two appeals we heard in Morataya's case (B193067, B179525) which resulted in the affirmance of Morataya's murder conviction.

killing. Palacios said she was angry because Noe had touched her buttocks the day before. She told Morataya about it, and he was angry too. When she entered the motor home, she hit Noe with a stick and kicked him in the head a couple of times. She gave Morataya the shirt, and he tied it around Noe's neck and began to pull on it. Palacios grabbed it and pulled even tighter, and Morataya began to bludgeon Noe's head with a piece of wood. Later, when she went back to clean up, she recalled that Noe had asked her to stop. When he asked her, she thought to herself "[w]hy stop when you touched me when – why stop when you – when I told you not grab on my ass, why didn't you stop? Why should I stop now?"

Palacios also told Youngblood that she took anti-depressant and anti-nausea medication earlier that day. The medications were part of the psychological counseling Palacios received because she had been raped by her uncle at age 7, and had been raped by a schoolteacher just a year earlier. When she was hitting Noe, she could see herself hitting both her rapists. She told Youngblood that "[i]t was like I was looking at my uncle, and I just wanted to kill" Asked how she felt knowing she had killed Noe, Palacios replied, "I don't know. It wasn't my intention." Palacios said she and Morataya had also been smoking crack cocaine before killing Noe.

Palacios was tried for Noe's murder as both a direct co-perpetrator and as an aider and abettor of Morataya.² Defense psychologist Nancy Kaser-Boyd testified that Palacios suffered from post-traumatic stress disorder as a result of being raped. Psychological testing showed that Palacios was both paranoid and hyper-vigilant to danger. The tests also suggested Palacios had a very weak ego and lacked both good boundaries and good self-esteem. Palacios had over-controlled hostility, which, combined with her stress disorder, meant she would bottle up her anger until she lost control. Test scores also showed Palacios was depressed, vulnerable, and fragile, placing

² This appeal arises from a re-trial after the judgment in the first trial was reversed (B181634). It appears that a new information was not filed for the re-trial, and respondent has asked us to take judicial notice of the information from the first trial. We grant that request.

her in the “suicidal constellation.” A person in this mental state who was also a sexual assault victim would overreact in an outburst of anger to having her buttocks grabbed. Kaser-Boyd believed Palacios was probably psychotic when Noe was killed.

On appeal, Palacios contends she received ineffective assistance of counsel because her lawyer did not request jury instruction CALJIC No. 4.21.2, concerning the effect of voluntary intoxication on an aider and abettor’s intent to assist in a murder. She also contends her lawyer should have requested a modified version of that instruction concerning the effect of a mental disorder on an aider and abettor’s intent.

DISCUSSION

To be liable as an aider and abettor of Noe’s murder, Palacios must have acted with knowledge that Morataya intended to kill Noe and must have intended to commit, encourage, or facilitate that crime. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123 (*Mendoza*).) Evidence that Palacios was voluntarily intoxicated or suffered from a mental disorder was admissible to show she lacked the specific intent required for an aider and abettor. (Pen. Code, §§ 22, subds. (a), (b); 28, subd. (a); *Mendoza*, at p. 1131; *People v. Saille* (1991) 54 Cal.3d 1103, 1111-1112 [Penal Code sections 22 amended, and 28 added, at same time to abolish diminished capacity defense].)

Palacios contends she received ineffective assistance of counsel because her lawyer did not request two jury instructions: (1) CALJIC No. 4.21.2, which instructs the jury that it can consider evidence of voluntary intoxication when determining whether a defendant actually formed the intent required to aid and abet;³ and (2) a modified version of that instruction to cover the effect of a mental disorder on the intent issue. To prove this, Palacios must show both that her lawyer’s performance was deficient when compared with the standard of a reasonably competent lawyer, and that, absent the

³ CALJIC No. 4.21.2 states: “In deciding whether a defendant is guilty as an aider and abettor, you may consider evidence of voluntary intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. [However, intoxication evidence is irrelevant on the question whether a charged crime was a natural and probable consequence of the [target] [originally contemplated] crime.]”

substandard representation, a different result was reasonably probable. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1030-1031.)

In *People v. Ledesma* (2006) 39 Cal.4th 641 (*Ledesma*) the Supreme Court held that the trial court did not err by refusing a proposed instruction that voluntary intoxication should be considered when determining whether the defendant acted with the intent required of an aider and abettor, because the issue was covered by other instructions. These included: (1) CALJIC No. 3.01, which told the jury that aider and abettor liability required proof the defendant intended to commit, encourage, or facilitate the crime; (2) CALJIC No. 4.21, which told the jury that it should consider the defendant's state of intoxication when determining whether he had the specific intent or mental state required for murder; and (3) CALJIC No. 8.77, which told the jury that it could consider the effects of intoxication on "defendant's ability to form any of the specific mental states that are essential elements of murder." The *Ledesma* court held that when the instructions were considered as a whole, "a reasonable juror would have understood that the intent element required in order to find defendant guilty of the crime of murder under the aiding and abetting instructions was a 'specific intent or mental state' to which defendant's state of intoxication was relevant." (*Id.* at p. 719.)

The jury in this case received the following relevant instructions: (1) CALJIC No. 3.01, which states that an aider and abettor must act "[w]ith knowledge of the unlawful purpose of the perpetrator" and "[w]ith the intent or purpose of committing or encouraging or facilitating the commission of the crime"; (2) CALJIC No. 3.31, which said that in the crime of first degree murder, and the lesser offenses of second degree murder and voluntary manslaughter, "there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists the crime to which it relates is not committed. [¶] The specific intent require[ment] is included in the definitions of the crimes set forth elsewhere in these instructions."; (3) CALJIC No. 4.21, which said that in the crime of first and second degree murder and voluntary manslaughter "a necessary element is the existence in the mind of the defendant of a specific intent or mental state which are specifically

defined elsewhere in these instructions. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required specific intent or mental state; (4) CALJIC No. 4.22, which defined voluntary intoxication; and (5) CALJIC No. 3.32, which said the jury should consider evidence of Palacios's mental disorder "solely for the purpose of determining whether the defendant actually formed the required specific intent, premeditated, deliberated or harbored malice aforethought which is an element of the crime charged, namely, Murder of the First Degree or the lesser crimes of Murder of the Second Degree or Voluntary Manslaughter."

As in *Ledesma*, *supra*, 39 Cal.4th at page 719, we hold that these instructions, when taken as a whole, directed the jury to consider evidence of voluntary intoxication and mental disorder when determining whether Palacios acted with the required specific intent of an aider and abettor. Palacios contends *Ledesma* does not apply because, unlike that case, the jury here was not instructed with CALJIC No. 8.77, which said that it could consider the of defendant's intoxication on his ability to form any of the specific mental states that were essential elements of murder. We disagree. CALJIC No. 3.32 told the jury it could consider evidence of mental disorder when determining whether, among other elements, Palacios "formed the required specific intent" of the crime charged. CALJIC No. 4.21 told the jury it could consider evidence of voluntary intoxication when determining whether Palacios had the "required specific intent or mental state" of the crime charged. This was tantamount to the wording of CALJIC No. 8.77.

Because no instructional error occurred, Palacios's lawyer did not provide substandard representation. Assuming for argument's sake only that Palacios's trial lawyer should have requested the two disputed instructions, we alternatively conclude a different result was unlikely because the other instructions adequately covered these issues.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.